IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

CRIMINAL SESSION NO. 86 OF 2020

THE REPUBLIC

VERSUS

FIKIRI S/O FRANSISCO

JUDGMENT

Date of Last Order: 11.10.2021
Date of Judgment: 15.10.2021

M. MNYUKWA, J.

The accused person, FIKIRI S/O FRANSISCO stands charged with the offense of murder contrary to section 196 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2019]. The Accused Person denied the charge and hence the full trial involving calling four prosecution witnesses and one defence witness.

The facts giving vise to the present case are short. The accused person is alleged to have murdered TABU d/o LUKONDYA (the deceased) on the 1st day of april 2018 at Nyamizeze Village within Sengerema

Districtr in Mwanza Region. The oofence was committed at around 19:30 hours. When the deceased was in the Kitchen with her two grandchildren preparing dinner. She was cut by machete and died when she was on the way taken to hospital. During the laminent of the severe pain of multiple cut counds and before her death, the deceased mentioned the accused to be her killer. During the trial, the prosecution side was represented by Mr. Hemed Khalid, Rehema Mbuya, and Sabina Choghogwe, the learned State Attorneys while Mr. Duttu Chebwa, learned Advocate represented the accused person.

The trial was conducted with the aid of three assessors namely; Kassim Athumani (56 yrs), Mariam Chendela (47yrs), and Martin Katigizu(56 yrs). I thank the counsels for their time and efforts in the finalization of this case and I extend my thanks to the gentlemen and lady assessors who sat with me and stated their opinion basing on the facts of the case. In summing up to the Lady and Gentlemen Assessors, all of them opined to find an accused FIKIRI S/O FRANSISCO guilty of murder as charged.

The prosecution called four witnesses, namely; Kalogi Makini (PW1), Rahel Martin (PW2), Simon Joseph Gati (PW3), and F9011 DC Bahati (PW4), and tendered two exhibits namely; the sketch Map (Exhibit P1),

The Post Mortem Examination Report for the deceased TABU D/O LUKONDYA (Exhibit P2). The Doctor sufficiently proved that TABU D/O LUKONDYA died and her death was due to excessive bleeding from the *multiple cut wounds*. The death of the deceased was among undisputed matters that was agreed by both parties.

At the trial, PW1 Kalogi Makini the 1st prosecution witness testified that, he was a husband of the deceased and on 01.04.2018, at around 19:30 hrs, his wife was murdered when preparing dinner. He testified that he had time with a deceased at a pombe pub before going back home and for he was a bit drunk. He went to sleep leaving her wife at the kitchen preparing dinner with her two grandchildren. He testified further that, at around 19.30 hrs his grandchildren came and awaken him claiming that the accused invaded the deceased and cut her with a machete. He went straight to the kitchen where he finds his wife complaining that the accused Fikiri assaulted her by cutting her and she was severely bleeding from the cut wounds and she went on complaining that *"Fikiri Njoo Unimalizie"*. PW1 raised alarm and people gathered who then managed to call the ambulance to rescue the life of the deceased though he was leter informed that she had passed away. He further testified that when the alarm was raised the accused who is also his

grandchild did not show up and was not seen at the scene the following day and did not attend the burial.

When cross-examined, PW1 consistently maintained that the accused did not show up when the alarm was raised, the following day and at the burial while the distance from his home is approximately two miles. He averred that the deceased was using a torch and he did not witness the accused cutting the deceased but the deceased told him that it was Fikiri who is his grandchild assaulted her. He testified further that the accused was alleging that the deceased was a witch. The learned counsel doubted the credibility of PW1 in view of some contradicting allegation in his statement in court that differ with his statement taken at police and therefore, his statement taken at the police station was tendered and admitted as Exhibit D1.

PW2: Rahel Martin Kalogi testified that she was living with her grandmother, the deceased. On 01.04.2018 at around 19:30 hrs when she was with the deceased in the kitchen preparing dinner, they heard two persons knocking on the door and she saw those persons one wearing a white shirt and the other a redshirt. She managed to identify his brother Fikiri who was wearing a red shirt because her grandmother the deceased lighten the place with solar torch which was very bright and outside there

was moonlight and it was not total dark. She testified that she was one step from the kitchen and near to the accused and her grandmother was in the kitchen and the accused and his fellow entered the kitchen and cut the deceased with machete and she saw everything. She then ran inside to call her grandfather and come back to find her grandmother who was still alive and was complaining tht *"Fikirini Umeniua Bila Sababu Njoo Unimalizie"*. Her grandfather raised alarm and people gathered and the grandmother was taken to hospital who died on the way. She went on that, the light was a solar torch which you can walk with it. Pointing at the dock, she testified further that the accused who is her brother, was the one who killed the deceased by cutting her multiple wounds and she managed to identify him.

When cross-examined, she testified to be 14 years age when the murder occurred and she knew her brother by face, voice, and the clothes he was wearing at the scene. She further testified that she gave a statement in a police station over the incident. Again the defence doubted the credibility of PW2 in view of some contradicting allegations in her statement to the police Exhibit D2 against what she testified in court.

PW3: Simon Joseph Gati testified to the extent that he is the Medical Doctor at Sengerema District Hospital. On 02.04.2018 around 1.00 pm

while he was at his duty station he conducted an autopsy on the body of an old woman who suffered multiple cut wounds inflicted by the heavy sharp object which lead to excessive bleeding and cause the death of the diseased. He went on to testify that he prepared a postmortem report which he identifies, tender the same to the court, and was admitted as Exhibit P2.

PW4: F9011 Detective Coplo Bahati testified that he is a police officer working at Sengerema Police station since 2005 and on 02.04.2018 at around 9 am he was instructed to go and draw a sketch map on the scene where the deceased was murdered and he thereafter, handed the sketch map to DC Mkama. The said exhibit P1 was admitted during the Preliminary Hearing. He went on testifying that, on 12.04.2018 at around 23:00hrs, he arrested the accused at his residence as he was mentioned by the complainant Kalogi Makiri and he took the accused person to Sengerema police station. On cross-examination, he went on testifying that, he was assigned the file to investigate and he wrote the statements of the key witnesses and was able to identify the statements in the court. He insisted that the accused person was mentioned by the complainant on 01.04.2018 and he escaped until he was arrested.

The prosecution case was marked closed and the court found out that the prima facie case against the accused person was established to require the accused to enter his defence. The defence case opens and has one witness FIKIRI S/O FRANSISCO, the accused.

Giving his evidence on oath, he testified that, the deeased is his grandmother. On 01.04.2018, he was at his home and it was Easter holiday and at around 4:00 p.m in the evening he was at home home and took his goats for grazing to the mountains and at around 19:00 hrs, at night he went back home and he sat in the fireplace (kikome) and then he was given hot water to take bath and then he joined her wife at a fireplace (Kikome). By that time his children were at the Centre for Ester celebration and after sometimes thay came back and joined them. They both get dinner and went to sleep. At around 22.00 hours, while asleep, his brother Wilson John came to his place and inform him that his grandmother, the deceased was cut by a machete as he was as well informed by Martin Karogi the other brother. He gets dressed and wearing a blue shirt and accompanied with Wilson to his father one Fransisco Mlandaji at Nyamizeze. When the three of them were headed to the scene, shortly before they reached to the scene they saw an ambulance and met with people who were gathered at the scene (wananzengo) to

include the accused's grandfather and his other brother Heneriko William and saw them carrying the deceased to the ambulance.

He testified further that; they went back home for they were told that no one was at Mr. Kalogi's house for his two sisters went to the house of Heneriko Wiliam. On the following day, he was on the way to the scene and he was informed by his brother Heneriko that her grandmother passed away. He testified to having visited the scene and there he met wananzego with his other grandfather, Mereka Makiri, the younger brother of the PW1, and his grandfather explained to them how it happened concern with the death of his wife and that he did not mention any person who is suspected. He went further that; he attended the burial which was conducted on 03.04.2018 and the family meeting conducted on 04.04.2018 and he vacate the place on 06.04.2018 and went back to his family. On 12.04.2018 he was arrested and sent to Sengerema District Court and while making his statement at police station, he denied having killed the deceased.

When cross-examined, he testified that he knows PW1 and PW2 as his relatives and they know him and his farming plots are near to the residence of PW1. He denied knowing that he was required to file a notice of information of Alibi to give his evidence that he was not at the scene

and did not call a witness for he did not know if he was supposed to call them. He went further that, he decided to go to his father's house because he is his parent. He added that he heard the testimony of PW1 denied his presence at the scene and the burial ceremonies but he was there. And, for Rahel PW2, he acknowledges that she is his sister who lived with him peacefully. He acknowledges that, on a fateful day, at around 19:30 hrs, there was moonlight as testified by PW2.

When he was re-examined, he testified that on the fateful day of the murder, at around 19:30 hrs, it was dark and it is not true that all that has been stated in court by PW1 and PW2 were true.

Having heard the prosecution and defense witnesses in this case, there is no doubt that TABU D/O LUKONDYA is dead and her death was unnatural. The issue for determination is who caused the deceased's death. I need to address my mind to the predominant legal principles which cover both aspects of criminal law as well as the law of evidence which are of relevance to this case and will guide me in this judgment. These principles are meant to ensure that no innocent person is convicted of freak or flimsy evidence. The prosecution is placed with a heavy burden than that of the accused.

The first long-established principle in criminal justice is that of the onus of proof in criminal cases, that the accused committed the offense for which he is charged with, is always on the side of the prosecution and not on the accused person. It is reflected under Section 110 and Section 112 of the Evidence Act, Cap.6 [RE: 2002], now [RE: 2019] and cemented in the case of **Joseph John Makune v R** [1986] TLR 44 where the Court of Appeal held that:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."*

The second principle is that the standard of proof in criminal cases is proof beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni** & **Another v R,** Criminal Appeal No. 25 of 2007 (unreported) held that: "

> *"Of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can*

only be convicted on the strength of the prosecution case *and not on the basis of the weakness of his defence."*

The present case before me, is a murder case, and therefore, it is important for the prosecution to prove malice aforethought, for the offense of murder involves the killing of a person with an intention planned. The accused is charged under Section 196 of the Penal Code, Cap.16 [RE: 2019] which provides that:- *"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".*

Therefore, the prosecution is duty-bound to prove the case against the accused person at two stages; *One,* that it is the accused person who killed the deceased TABU D/O LUKONDYA, and two, that he did commit the killing with malice aforethought as stipulated under Section 200 of the Penal Code, Cap. 16[RE: 2002] now [RE: 2019]. The Actus Reus is well proved for it is undisputed that the deceased TABU D/O LUKONDYA died and the cause of her death was due to multiple cuts wounds inflicted on her body which resulted to severe bleeding and hence the death (exhibit P2). Heartlessly, the multiple-cut wounds were brutally inflicted by using a heavy and sharp object, therefore, the assailants do it with malice

aforethought and there is no dispute that the assailant contemplated and intend to kill.

What tasking, and the most contentious issue before me and which prompted the trial of this case is *whether it is the accused persons, FIKIRI S/O FRANSISCO who killed the deceased TABU D/O LUKONDYA.*

The prosecution had four witnesses that were PW1, PW2, PW3, and PW4 who testified in connection to the death of the deceased TABU S/O LUKONDYA as against the accused person who gave his evidence under oath as DW1, denied the charges and has no witness. First, the evidence of a medical doctor, PW3 who testified to have examined the body of the deceased, and without doubt or objection, his testimony established that the deceased died and the death was unnatural. Secondly, PW4, a police officer at Sengerema police station, testified to have arrested the accused and investigated the case, in fact, the accused denied to have murdered and was present before the court and faced his trial.

Third, was the evidence of PW2 and before going to details, and taking into account the time when the crime was committed, which is stated to be at around 19:30 hrs, and without fail to recall that, one Rahel Martin Kalogi, the accused's sister, testified to have witnessed the

accused committing murder. It is imperative that, with all other evidence, I have a testimony of the eyewitness.

Before I analyze the evidence of PW1 and PW2, I wish to state that I rated them as credible witnesses as I was in a better position to assess their demeounour and come to the conclusion. I reached that conculusion after noted the alleged contradictions to the evidence of PW1 and PW2 statements before the police and their testimonies in this Court. Indeed in his statement at police PW1 stated that his wife joined at the pombe pub when she was coming from the church and joined him until 16.30 hours in the evening when she came back home while his statement in court shows that his wife joined him at pombe pub around 11.00 a.m On the side of PW2 in her statement at police she stated that she identified the accused at that night by using torch while in court she stated that she used solar to identifty the accused, and she stated that her grandmother lighten on the area and she managed to see the accused by using that light. When I scrutinize the evidence of PW2 I understand that that they were using the torch that was powered by solar. The other contradiction between her statement at police and in court is on the identification of the accused by his voice, face and clothes where by these statement were only stated in court, while her identification at the poice was that he identified the accused Fikiri. In my view, these contradictions of PW1 and

PW2 are not contradictions worth to result to consider them as not credible witnesses and vitiate their credibility and the merit of the case.

After holding so, I will start with the issue of Identification and from the evidence of PW2 therefore, I am now obliged to first determine as to whether the identification was proper, and in doing so, I will determine the issue as to *whether the identification of the accused left no doubt or whether was no mistake of identity.*

Undoubtedly, the law of visual identification is that such identification must be watertight to find conviction. It is pertinent that I refer to the guidelines on visual identification as stated by the Court in its important decision in **Waziri Amani v. Republic** [1980] TLR 250, where the Court cautioned, at pages 251 to 252, that:

> "... *evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight*
> "

Then, the Court stated, at p. 252, that:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

[Emphasis added]

(see; **Shamir John v Republic, Criminal Appeal No. 202 of 2004 CA (unreported), Yusuph Sayi & 2 Others vs R Criminal Appeal No. 589 of 2017 and Mabula Makoye & Another vs Republic Criminal Appeal No. 227 of 2017**).

Guided by the above authorities, In my determination, therefore, I subject the evidence of PW2 on detailed and careful inquiry to find if PW2 stood a chance of proper and honest identification of the accused person as testified during the trial.

First, PW2 established that the accused is her brother who before the incident, they lived happily with no grudges from each other. From that point, PW2 managed to establish that, he knows the accused before and was used to him as a brother and therefore generates a high degree of correct identification.

Second, it is undisputed neither by the prosecution nor the defence that the incident of murder occurred at around 19.30 hrs and the night was befalling, and an extra light was needed for proper identification. PW2 in her evidence established that the deceased was using a torchlight powered by solar while in the kitchen which is undisputed for PW1 testified to give the torch to the deceased before he went to sleep, and when the door was knocked the deceased light-up the accused who, PW2 managed to identify that at a material time, the accused was wearing a redshirt. Giving attribute that helped PW2 identify the accused, she testified that, the torch powered by solar was bright for her to recognize the accused who at all was known to her and also, outside the kitchen was a bright moonlight the testimony which was also admitted by the accused during

cross-examination. On the size of the place illuminated by the solar, PW2 stressed out that the kitchen was small. Again, I find the circumstance were favorable for the PW2 identification.

Third, PW2 went further that she identified the voice of the accused. This factor did not detain me much for two reasons. One, the voice identification has already been subjected to test and found out that is not a good factor to rely upon on identification. In the case of **Nuhu Selemani V R** (1984) TLR 93 it was stated that:-

> *"Also it is notorious that voice identification by itself is not very reliable."*

And two, PW2 though established that she was able to recognize the voice of the accused person, she fall short to tell words uttered and the salient features of the accused voice that made her recognize his voice as against other persons. In **Stuart Erasto Yakobo V R,** Criminal Appeal No. 202 of 2004 (unreported) it was held that:-

> *"For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of a crime.*

(see also:- ***Baldwin Komba @ Ballo versus Republic*** *(CAT) Criminal Appeal No. 56 of 2003 (unreported).* ***Kanganja Ally and Juma Ally***

versus Republic *(1980) TLR 270)"* it is for that reason I find that, the voice identification was not proper for this court to rely upon.

Vital important, and before retiring from the evidence of PW2, and rule out that indeed the accused was identified, and having in mind that apart from the evidence of identification there is also the evidence of PW1 the accused grandfather, both PW1 and PW2 testified that the accused is their relative to mean a brother to PW2 and a grandchild to PW1 and they have no grudges. This tasked my mind to weigh the credibility of the PW1 and PW2 as the law is trite and principles have been set that, the important point is as to the credibility of the witness for eye witness testimony can be a very powerful tool in determining a person's guilt or innocence but it can also be devastating when false witness identification is made due to honest confusion or outright lying. In **Jaribu Abdalah v Republic** [2003] TLR 271, CAT, quoted with authority in the case of **Mawazo Mohamed Nyoni @ Pengo & 2 Others vs Republic, Criminal Appeal No. 184 of 2018** held that: -

> *"In a matter of identification is not enough merely to look at factor favoring accurate identification equally important is the credibility of the witness, the ability of the witness to name the*

offender at the earliest possible moment is reassuring though not a decisive factor"

Taking into consideration the evidence of PW1 and PW2 that they are the blood relative to the accused, the testimony which was the same admitted by the accused, I equally find PW1 and PW2 credibility not questionable for it has never been established as to what gain PW1 and PW2 could give evidence against the accused. Therefore, I proceed to hold that, PW2 is credible witness and her evidence can the same be relied upon by this court.

PW1 and PW2 evidence introduced the evidence of dying declaration that the diseased named the accused before her death. I subjected PW1 and PW2 evidence on a test to find out if the purported evidence qualifies the dying declaration to the degree that it can be relied on by this court.

Under section 34B of the Evidence Act, Cap.6 [RE: 2019], a statement made by a deceased person relating to his cause of death is admissible in evidence. The admissibility of statements under section 34B (2) of the Evidence Act, Cap. 6 [RE: 2019] was discussed at length in the case of **Elias Melani Kivunyo v Republic,** Criminal Appeal No. 40 of 2014 (unreported). The dying declaration in question is oral dying

declaration whereas PW1 and PW2 testified that the deceased repeatedly mentioned the accused to have assaulted her with the repeated words that "*Fikiri Umeniua Bila Sababu Njoo Unimalizie*" to mean that Fikiri kills her for no reason that he has to come and finish her off. Before I could rule out that a dying declaration can be relied upon by this court, I subjected the same to several tests to find out *whether:* - One, the deceased made such declaration. Two, the deceeased was able to identify the accused Three, the deceeased was at a good state of mind to be consistent to point the accusation to the accused person in exclusion of any other person, and four, whether there is another evidence on record to corroborate the same.

On the first aspect, I find that, according to the circumstances and the testimony of PW1 and PW2, the words were indeed uttered. On the second aspect, I also hold that, at the time and shortly before the deceased was assaulted she was able to identify the accused. PW2 testified that the deceased light-up the solar-powered torch to the accused and named him. The identification was quick for it is undisputed that the accused is the deceased grandchild, therefore, able to make a quick identification.

On the third aspect, I proceed to hold that the deceased was at a point to maintain her consistency. Giving the nature of the assault,

according to Exhibit P2 (the postmortem report), the deceased was cut on her forearm, on her face, and on her shoulder that could not directly distract her mental faculty instantly and therefore the inference is drawn that her mind though subjected to fear, was in the position to maintain consistency. As a general rule, as it was stated in the case of **Romanus Kabogo v Republic,** Criminal Appeal No.62 of 1998 and **Hemsi Nzuunda and two Others v Republic**, Criminal Appeal No.34 of 1995 the Court of Appeal of Tanzania held that:-

> *"As a general rule, a court can act upon a dying declaration if it is satisfied that the declaration was made if the circumstances in which it was made give assurance to its accuracy and if is in fact true."*

In view of the evidence of PW1, there is no doubt that the deceased made the declaration and at the time she so declare, she was consistent with the words uttered that implicates the accused who is her grandchild.

Finally, on the fourth aspect, I am fully aware that a dying declaration falls under the category of evidence in which material corroboration is necessary before it can be accepted and relied upon as it was observed in the case of **Crospery Ntagalinda @ Koro v Republic,** Criminal Appeal No. 312 of 2015 (unreported), and the case of The

Republic v Joseph Ngaikwamo [1977] LRT No. 6. Therefore, apart from the evidence of PW1, there is also evidence of PW2 who eye-witnessed the accused. Guided by the above authority, I hold that in the instant case the evidence of dying declaration was reliable and therefore can be acted upon by this court.

Again, PW1 testified in regards to the circumstances after the death of the deceased that, though the accused is his grandson, he did not show up after the murder and did not attend the burial. The accused DW1 objected and testified that he went to the scene the day of the murder on 01.04.2018 where he met with PW1 on the way to hospital and he stayed from 02.04.2018 attending all activities to include burial, till 06.04.2018 when he left and was arrested on 12.04.2018. In his testimony he named his company at the scene to be Fransisco Mlandaji, his father, William John, his brother Hereniko Wiliam and his grandfather Mereka Makiri. At the trial, the accused did not call any witness. I am left with caution if at all there were persons who could state as to the innocence of the accused as against the prosecution accusation, why DW1 did not use his constitutional rights to call them or at all to have them called to testify. This made me not subscribe to his defence that he was not aware that he was required to call a witness and find it unattainable for the reasons that,

the accused was assisted with an attorney and fairly, it was his formed opinion from the Preliminary Hearing stage for he decided to defend himself.

From his testimony, the accused testified that he was arrested on 12.04.2018, which again corroborates the evidence of PW1 and PW4 that the accused was named the very day of the murder to the police and he escaped until he was arrested on 12.04.2018. as stated in the case of **Marwa Wangiti Mwita & Another vs. Republic, Criminal Appeal No. 06 of 1995,** that: -

> *" The ability of the witness to name a suspect at the earliest opportunity is an important assurance of his credibility; in the same way as unexplained delay or complete failure to do so should put prudent court to inquire."*

This also adds to the credibility of PW1 and PW2 that they name the accused at the earliest time possible that leads to his arrest on 12.04.2018.

In the upshot, I have reached the following conclusions. The law is settled that the accused ought to be only convicted on the strength of the prosecution, I am satisfied that the prosecution's evidence is credible and reliable. I do not think that the positive evidence of PW1 and PW2 is shakable. I am in accord with all assessors that the prosecution has

proved their case beyond reasonable doubt against FIKIRI S/O FRANSISCO the accused person. In the event, I find that FIKIRI S/O FRANSISCO is guilty as charged. I, therefore, convict him for murder contrary to section 196 of the Penal Code Cap. 16 [RE: 2019]

DATED at MWANZA this 15th October, 2021

M.MNYUKWA
JUDGE
15.10.2021

SENTENCE

Since FIKIRI S/O FRANSISCO, the accused has been convicted of murder, I hereby sentence him to death by hanging in terms of section 197 of the Penal Code, Cap 16 R.E 2002 now R.E 2019.

THE HIGH COURT OF TANZANIA MWANZA

M.MNYUKWA
JUDGE
15/10/2021

Court: The right to appeal against this Judgement is fully explained and guaranteed.

M.MNYUKWA
JUDGE
15/10/2021